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LEGAL AID: A CLEARER PICTURE

BEFORE the 2nd October those solicitors who become members of the panels constituted under the Legal Aid and Advice Act will have much that is new to study and assimilate. Although the scheme prepared by The Law Society has even now not been made public—it is presumably still undergoing the scrutiny of the Lord Chancellor's Advisory Committee—there is reason to suppose that its approval by the Lord Chancellor can be expected shortly. Meanwhile, the main features of the scheme can be inferred from the Legal Aid (General) Regulations, 1950 (which are discussed more fully elsewhere in this issue), and from certain extracts appended to the booklet on legal aid which has this week been circulated to the profession by The Law Society. Apart from the formal constitution of area and local committees and provision for the latter to work through "certifying committees," it appears that the scheme will permit solicitors entering their names upon the panels to limit the types of proceedings in which they are prepared to act for an assisted person: in other words a limited degree of specialisation will be possible by joining, say, only the panel for proceedings in the Chancery Division. Applications to join the panels are to be made to the area secretaries.

The General Regulations in themselves, moreover, provide answers to a number of very practical questions which must have troubled many solicitors. Where legal aid has been granted after the commencement of proceedings, for example, it is now clear that a solicitor who has acted in the proceedings on behalf of the assisted person before the issue of the certificate must look to The Law Society, through the area committee, for payment of his taxed costs. Again, it is apparent that a solicitor acting for an assisted person will not be allowed a completely free hand in the conduct of the proceedings: such steps as the addition of parties, the instruction of more than one counsel and even the bespeaking of a transcript of the shorthand note will ordinarily have to be sanctioned in advance by the area committee on pain of disallowance of the costs of any such step. The regulations also throw light on the position of a firm of which one partner is a member of a panel while others are not: in such a case it is expressly provided in effect that the conducting solicitor may entrust the conduct of any part of the assisted person's case to a partner of his or to an employee in his office. These and similar questions are of immediate importance to all practitioners, whether or not enrolled upon a panel, and the regulations will repay close attention.

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CURRENT TOPICS

Viscount Hailsham

THE older generation of lawyers were saddened last week by the news of the death of LORD HAILSHAM, formerly Sir Douglas McGarel Hogg, K.C., known not only as a lawyer outstanding among his contemporaries, but as a clean-fighting, hard-hitting and courageous advocate. He was called to the Bar when he was 30, in 1902, having before his call entered the office of Messrs. Ashurst, Morris, Crisp & Co., the well-known London solicitors. He took silk in 1917, became Attorney-General in 1922 and was knighted in the same year. In 1928 he was appointed Lord Chancellor, at first became Baron Hailsham and in the following year was advanced to Viscount. On the formation of the National Government in 1931 he became Secretary of State for War. In 1935 he returned to the Woolsack and in 1938 he became Lord President of the Council. Shortly afterwards he resigned from the Government, and retired. No account of his life would be complete without mention that, notwithstanding his first rejection for service in the South African War, he eventually succeeded in serving with the Lothian and Berwick Yeomanry in South Africa. During the 1914–18 war he was Group Adjutant of the County of London Volunteer Regiment. Son of the great Quintin Hogg, who founded the Regent Street Polytechnic, he continued the tradition, and his own son, who now succeeds to the Viscounty, it was his comfort to know, worthily maintains it.

London Crime in 1949

IN 1949, for the first time since the war, according to the annual report of the Commissioner of Police of the Metropolis (Mr. HAROLD SCOTT), there was a big decrease in the number of indictable offences known to the police in the Metropolitan area. Experienced C.I.D. officers, the Commissioner states, are unanimous in attributing this largely to the Criminal Justice Act, 1948. Section 21 of that Act, which created new sentences of corrective training and preventive detention, came into force on 18th April, 1949, and the report points out that there is no doubt that its implications have been fully appreciated by the criminal community. Each year since 1945 there has been a small decrease in the number of indictable offences from the peak figure of 128,954, but in 1949 there was a decrease of 20,520, or 16·2 per cent., compared with the previous year. Crime, however, still remains much higher than before the war, and the report states that there is no cause for complacency. It is of course a matter of great satisfaction that criminals are deterred by the new legislation. As proof of this the Commissioner states that habitual criminals are found on arrest to be in possession of copies of the 1948 Act and he adds: "Indeed, it is reported that in some cases housebreakers have disposed of their tools of trade and have decided that the possibility of a long period of detention raises the risks of their calling beyond the point where it is remunerative." Undermanning of the police force and its allied question of housing remain real problems to be tackled, and it is good to know that practical steps are being taken to increase recruitment.

Scots Legal Aid

THE Law Society of Scotland has announced the membership of the varous committees set up to administer the Legal Aid Scheme made by the Society under the Legal Aid and Solicitors (Scotland) Act. The central committee consists of five members appointed by the Law Society of Scotland, three appointed by the Faculty of Advocates and two by the Secretary of State. The Supreme Court Committee consists of four members appointed by the Law Society of Scotland and four by the Faculty of Advocates. There are twenty local committees of from four to nine members. These local committees are appointed by the Law Society of Scotland.

The Honest Solicitor

THE news has been published in the *Evening News* of 18th August that "some City solicitors intend to ask The Law Society to get the appropriate authorities to expunge what they consider to be a slur upon their profession." The alleged slur is contained in an inscription, to be found by the zealous searcher, upon a tablet in St. Dunstan's Church, Fleet Street. It reads: "To the Memory of Hobson Judkin, Esq., late of Clifford's Inn, THE HONEST SOLICITOR, who departed this life June the 30th 1812. This Tablet was erected by his Clients as a token of gratitude and respect for his honest and friendly conduct to them through life. Go Reader and imitate Hobson Judkin." We are not told the source of this delectable information and its vague nature seems to cry out for what lawyers call, in their tiresome technical way, further and better particulars. If any solicitor really feels that this ancient inscription is a slur which should be expunged, we would respectfully ask him to pause and reflect whether a display of what might be construed as excessive sensitiveness will benefit his profession. He might also consider whether a tablet erected in a church by a solicitor's grateful clients 138 years ago is not rather a compliment to a great profession than an implied slur, and whether there are any known cases of the grateful patients of a doctor, for example, erecting such a testimonial.

The Client's Point of View

THE President of the Queensland Law Society told the annual meeting of the Society at Brisbane on 22nd June, 1950 (*Law Institute Journal* for 1st July), how, when shortly after he was admitted to practise as a solicitor he was having a holiday in Sydney, he thought it would be good experience to visit some legal man in Sydney as a client, and obtain advice, the purpose being, as he said, to learn what he could as to the proper method of approach of a legal man to his client. He represented himself as an investor and propounded some interesting questions to the various legal people he visited, and although he was poorer in pocket at the conclusion of his visit, he gained some very valuable experience, besides having a very interesting and instructive holiday. The point that the President made might at first sight appear to be that it was desirable for solicitors on vacation to help their struggling brethren by taking on the guise of clients. Such a course, however, might possibly end in the uneconomic result that members of the profession would be taking in each other's washing, and it is a relief therefore to learn that his object was merely to learn the client's point of view. He was thereby enabled to advise members that they should try to familiarise themselves with all the laws, because "the public are apt to judge one solicitor by another." Nothing, he said, gave the public greater confidence than the ability of a legal man to be able to direct the client promptly as to the existing state of the law concerning the problem presented to him by the client.

THE LEGAL AID REGULATIONS

THE implementation of the new Legal Aid Scheme is carried a stage further by the publication of three Statutory Instruments (S.Is. 1950 Nos. 1357, 1358 and 1359).

The first of these, the Legal Aid and Advice Act, 1949 (Commencement) Order, 1950, is made under s. 17 (2) of the Act and provides that certain parts of it shall come into operation on 2nd October next. These parts are those relating to legal aid in the Supreme Court (not House of Lords) or in the county court on a remittal from the Supreme Court. As had already been announced, the implementation of the remaining sections, relating mainly to assistance in actions instituted in the county courts and to the establishment of legal advice centres, has been postponed indefinitely. From the point of view of the public, therefore, all that is being done immediately is to extend the present Poor Persons' Procedure so that it applies to vastly greater sections of the community, who are to receive assistance graded according to need. From the point of view of the legal profession, however, the change is fundamental, for whereas at present they receive no remuneration for poor persons' work, they will in future receive a State-guaranteed payment of their taxed disbursements and of 85 per cent. of their taxed solicitor-and-client High Court costs, and the whole—such as it is—of county court costs.

The second Statutory Instrument, the Legal Aid (Assessment of Resources) Regulations, 1950, lays down the principles upon which the National Assistance Board shall compute the disposable income, disposable capital and maximum contribution of the applicant for legal aid. Since the work will be undertaken by the Board, the regulations are of no direct importance to the lawyers working the scheme, but they are nevertheless of concern to all interested in the social consequences of the scheme and especially to lawyers who may have to advise, either as poor man's lawyers or professionally, whether their applicant has any prospect of being able to take advantage of the new facilities.

The basic principle, as laid down in the Act, is that aid shall not be available to an applicant where disposable income exceeds £420 a year, and may be refused if he has disposable capital of more than £500 (s. 2 (1)). If he comes within these limits the maximum contribution which can be required of him is half the amount by which his disposable income exceeds £156 a year and the whole of his disposable capital over £75 (s. 3 (1)). The Act provides (s. 4) that certain allowances shall be made in determining disposable income and capital, and it is the purpose of these regulations to work out in some detail how total income and capital shall be determined and what allowances shall be made in order to arrive at the "disposable" fraction. Here we cannot do more than draw attention to one or two salient points.

The value of the subject-matter of the dispute is to be excluded (reg. 2). Normally, except in matrimonial causes, the resources of husband and wife are to be aggregated (reg. 4). Elaborate provisions are made in respect of an infant, the general principle being that the Board may take into account the resources of anyone liable to maintain him or the amount which any person may in fact be reasonably expected to contribute to his maintenance (reg. 5). A person's resources under a discretionary trust or the like may be taken into account (reg. 3), and artificial transactions designed to get rid of assessable resources are to be ignored (reg. 6). Assessments may be rectified in the event of error or mistake, or on a change of circumstances (regs. 10 and 11).

The detailed rules for computing income are laid down in Sched. I. It is normally to be an estimate of the income for the year in the light of the actual income for the preceding year. Various National Assistance awards are to be ignored, but generally only up to £1 per week in the aggregate. Various allowances are to be made. These include such things as income tax, National Insurance contributions, rent of the home to the extent to which it exceeds £39 per annum, but with an upper limit also, £52 in respect of a spouse (if cohabiting) or the amount of actual and reasonable maintenance payments (if not), and allowances in respect of dependent children and relatives not exceeding £78.

Computation of capital is dealt with in Sched. II. In general, all assets of a capital nature are to be taken into account and valued on normal principles, but, *inter alia*, household furniture and effects, clothing and tools of trade are to be ignored. Of particular importance is the provision that the value of the house in which the applicant lives is to be ignored if its unincumbered value is less than £2,000. One-half of the amount by which it exceeds that sum is, however, to be taken into account. Various allowances are also to be made here; for example, debts due, and £75 in respect of a wife or dependent child or relative living with the applicant. There appears to be a printing error in para. 3 of Pt. II of the Schedule, which refers to an allowance for any debt "owing to" the applicant when "owing by" is obviously intended.

In respect of both income and capital, flexibility is procured by provisions that where there are special circumstances assessments may be adjusted as is appropriate to meet these circumstances.

The third Instrument, the Legal Aid (General) Regulations, 1950, is that which most directly concerns the legal profession, as it lays down the general procedure for working the scheme and the duties of area and local committees.

An applicant resident in England or Wales may refer to any local committee (reg. 3 (1) (*a*)), but if the committee think the application could more conveniently be dealt with by another, they may transfer it (reg. 3 (5)). The responsibility for dealing with all applicants resident abroad is, however, cast on the London Committee (reg. 3 (1) (*b*)). Applications are to be in writing and shall contain such information and shall be accompanied by such documents as may enable the committee to determine the circumstances and the reasonableness of granting aid, and the Board to assess means (reg. 3 (3) and (4)). This can obviously be little more than a pious hope, since the vast majority of applicants will be quite incapable of adequately completing the required forms without legal assistance. This is already the case with the present poor persons' applications, and the new forms are likely to be considerably more complicated in view of the greater details needed of means. That such assistance would be required was recognised by the Act, which envisaged that it would be given by advisers at the legal advice centres, but that will not now be possible as that part of the scheme is not yet to be brought into operation. Existing P.M.L. centres may be able to help, but many of them seem to be on the verge of extinction owing to lack of financial resources and to shortage of manpower. This latter shortage is likely to be aggravated by the new scheme as most of the present P.M.Ls. will be serving on local committees and are thus likely to have to curtail their present voluntary activities. We have already suggested in these columns that it is a false economy to suspend that part of the scheme which would assist in the avoidance of litigation and facilitate and cheapen the preliminaries in cases where it proved inevitable. It is now too late to revise that policy, but it is strongly suggested that the Government should at least ensure that some small

financial resources are made available to voluntary bodies, such as the Bentham Committee, to enable them to ensure that at least the present centres remain in operation. Unless this is done the secretaries of the local committees are likely to be overwhelmed by the work of assisting applicants to complete application forms. There is even a danger of the growth of unqualified legal consultants who will cash in on a public need by establishing offices adjoining those of the committees and there undertake to help applicants to complete the forms. Indeed, if retired managing clerks chose to earn an honest living by doing this for a reasonable fee, it might be argued that they were fulfilling a public service.

In the case of applicants resident abroad, the application, which must be in English, must be sworn and verified by " a responsible person " and accompanied by an undertaking to repay the expense of any preliminary inquiries (reg. 3 (4)). It is not difficult to imagine the difficulties that these cases are likely to cause, particularly to the Board in the assessment of means, and as many of the prescribed " allowances " will be inapplicable, they will obviously have to be treated as special cases and dealt with under the wide powers of adjustment referred to above.

Wisely, the exact procedure to be adopted by local committees is not prescribed, so that they will have the widest discretion in deciding on preliminary inquiries and interviewing of applicants. They are to consider the whole circumstances, including questions of fact and law, and in general will not grant a certificate except after the Board has determined means and maximum contribution (reg. 4 (1)). But although it is for the Board to determine the maximum contribution, it is for the local committee, if they decide to grant a certificate, to assess the actual contribution to be required, having regard to the probable cost of the proceedings (reg. 5 (3)). So long as the scheme is restricted to High Court cases the committees are not likely to be greatly worried by the need to make meticulous financial estimates, for there can be few cases where the means of the applicant are sufficiently small for him to be entitled to assistance yet his maximum contribution sufficiently large as to be in excess of the likely cost of High Court proceedings. If, in exceptional circumstances, they have assessed the contribution at less than the maximum the area committee may increase it up to the maximum if the actual costs prove in excess of the original contribution (reg. 5 (5)).

Special instructions are given in the case of representative actions (regs. 4 (4) and 5 (6)) and actions which can be consolidated (reg. 4 (5)), and those in which costs would normally be payable out of an estate (reg. 4 (3)). Of some interest are the rules relating to cases where the applicant has the possibility of obtaining financial assistance from some other organisation, e.g., a trade union. The Assessment of Resources Regulations provide that the amount of such expected assistance shall be ignored by the Board (Sched. II, Pt. I, para. 7), but the local committee shall not approve the application unless satisfied that all reasonable steps have been taken to secure it without success (reg. 4 (6)), and an undertaking must be given to pay to The Law Society any sum in fact received (reg. 5 (7)).

Where the applicant's income is within the maximum limit but his disposable capital in excess of £500, a certificate shall only be granted if the probable costs would exceed the maximum contribution.

A certificate may be granted in respect of the whole or part (e.g., up to obtaining security) of proceedings in a court of first instance or an appeal court, but not for both at the same time, and shall be limited to one action (reg. 5 (1) and (2)). If a second application is made in respect of an appeal, the original assessment of resources by the Board will normally be accepted (reg. 5 (4)). The committee are to notify the applicant of his maximum contribution and the terms on which a certificate will be issued and must draw his attention to s. 2 (2) (*e*) of the Act relating to his liability under an order for costs made against him (reg. 5 (9)). The contribution may be required in a lump sum or by instalments (reg. 5 (8)). The applicant must then notify his acceptance, pay any contribution then payable, and select a solicitor on the appropriate panel (reg. 5 (11) to (14)).

Regulation 6 deals with refusals of applications. The committee must notify the applicant of the grounds for rejection and of his right to appeal to the area committee under reg. 9. No appeal is to lie against any determination of the Board (which is fair enough as a legal committee would not be in a position to review it) or against any decision of the local committee as to the amount of any contribution or the method by which it shall be paid. This last limitation seems unnecessary and unfortunate. The area committee are as qualified as the local committee to deal with contributions and if they were entitled to do so it would be possible to preserve a measure of uniformity ; in the absence of a power to review, the decisions of the various local committees are likely to vary widely, particularly as regards the method of payment. The appeal against refusal may be conducted personally or, at the applicant's own expense, by counsel, solicitor or any other person. Even if the appeal is successful there seems to be no power to award costs ; in such a case it would surely not be unreasonable that the applicant's costs should be treated as costs in the action and not added to his maximum contribution.

Other regulations deal with the power of area committees to amend (reg. 8), discharge or revoke (regs. 11 and 12) certificates, or to take action to prevent abuse by repeated frivolous applications (reg. 7). Of particular importance is reg. 10, enabling certain members of the local committee to grant emergency certificates remaining in force until revoked, expressly or by lapse of time, or until converted into a normal certificate. Regulation 13 deals with the case where aid is granted after the commencement of proceedings and preserves the original solicitor's rights to costs and to a lien.

The conduct, by the selected solicitor, of the proceedings is dealt with in reg. 14. In general he will have the same freedom of action as he possesses normally, but certain things can only be done with the consent of the area committee. He may, for example, brief any counsel on the panel but may not instruct more than one without such consent, nor may he add parties, bespeak shorthand notes, bring a cross-action, or lodge any interlocutory appeal. Such consent is also required for the engagement of expert witnesses, but The Law Society may give general directions authorising one expert witness for specified types of actions and laying down maximum fees. Solicitors and counsel may give up a case if the applicant requires it to be conducted unreasonably, but the solicitor must then submit a report to the area committee, who may either discharge the certificate or require the applicant to select another solicitor. No part of the case may be entrusted to anyone not on the appropriate panel, unless he be a partner or employed in the office of the conducting solicitor.

The whole of this reg. 14 requires the most careful study by all solicitors taking part in the scheme, for a disregard of its provisions may prejudice their right to costs and turn work which should show a small profit into a serious loss.

The remaining regulations deal with such matters as the service of notices on other parties (reg. 15), recovery of

property and costs awarded to assisted litigants (reg. 16), the award of costs against assisted litigants (reg. 17), and other miscellaneous provisions as to costs in special cases (reg. 18). Conveyancers may be interested in reg. 19, which vests in The Law Society the charge on any property recovered and provides that if it affects land it shall be a land charge of Class B. Regulation 20 lays down transitional provisions relating to pending poor persons' cases.

It will be observed that the regulations give no detail of what, from the point of view of solicitors, is perhaps the most important question, that of the various panels for which they are to be asked to volunteer. But details of these have now been circulated to all practising solicitors and this should give time for the panels to be adequately filled by the commencing date. There is no reason to fear an inadequate response from the profession, which recognises that collaboration is dictated not only as a social duty but out of self-interest. With The Law Society's circular is enclosed a short booklet giving an admirable summary of the Act and regulations, and extracts from the detailed scheme itself. A fuller handbook giving the Act, regulations and scheme in full is in course of preparation.

It is to be hoped that the introduction of the new arrangements on 2nd October will be heralded by adequate publicity in the Press and by B.B.C. broadcasts. At present the majority of the public are completely ignorant of it; a distinguished American jurist, on a recent visit to this country, asked everyone he met about it but found none who had heard of it except for one lady, who remembered reading that she would not be able to sue for breach of promise!

L. C. B. G.

COUNTY COURT PROCEDURE

THE Committee on County Court Procedure, of which Mr. Justice Austin Jones was chairman, presented its final report in April, 1949, and a summarised account of its recommendations appeared at 93 SOL. J. 275, 293 and 309.

Legislation would be required to implement some of the committee's recommendations, and if any decision has been reached thereon no steps have yet been taken to make it effective.

At the end of 1949, two measures were introduced which had their origin in the committee's deliberations and recommendations, namely, the Administration Order (Amendment) Rules, 1949, and the County Court Fees Order, 1949 (see 93 SOL. J. 814). Both came into force on the 1st January, 1950.

The final report has now been further implemented by the County Court (Amendment) Rules, 1950, and, in a minor matter, by the County Court Funds Rules, 1950.

The substantial reforms which are to come into operation on the 1st September, 1950, comprise most of, but not all, the proposals of the Austin Jones Committee capable of being introduced without legislation. A significant development of importance to county court practitioners is the prescription of completely new scales of costs.

The notes which follow indicate the principal changes.

DEFAULT ACTIONS

It will now again be possible for a default action to be commenced for the recovery of a sum of £2 or less, as was allowed under the original 1936 Rules, afterwards in 1943 excluded by amendment. It will be necessary to file particulars of claim in such actions, the proviso to Ord. VII, r. 1 (1), not being applicable to default actions.

A simplified form of summons (Form 22) is now prescribed, without the familiar perforated slip for use by the defendant as an admission, defence or counter-claim. In lieu thereof, the registrar will annex a separate new form (Form 18A), which will presumably be of more substantial size. The committee recommended that this form should be the same size as the summons. It will also apparently be capable of being folded, and despatched by post without requiring an envelope, but is *not* (as the committee recommended) to be franked as "official paid" without a postage stamp.

The solicitor's fixed costs to be entered on a default summons on issue will now be (new Appendix D, Part I)—

	Service not by solicitor £ s. d.	*Service by solicitor* £ s. d.
Claim exceeding £2 and not exceeding £10	10 0	13 0
Claim exceeding £10	1 0 0	1 8 0

This scale clearly follows the principle expounded in the committee's report that ordinary "debt-collecting" cases do not merit the range of costs hitherto recoverable. A considerable reduction is effected in regard to claims exceeding £20.

A new method of serving a default summons is introduced on the model of Ord. VIII, r. 8 (1A), a war-time measure relating only to ordinary actions which has been in operation since 1944 (new proviso to Ord. VIII, r. 32 (1)). Where the bailiff has failed to effect personal service and the registrar is satisfied from the bailiff's report that service by post would be effective, the registrar may of his own volition, without requiring any application by the plaintiff, cause the summons to be served by an officer of the court (not necessarily a bailiff) sending it by post (registered or otherwise) addressed to the defendant. This power is shared by the registrar of a "foreign court" to which a summons has been sent for service. The time of service will be presumed to be the time when the summons would be delivered in the ordinary course of post. This extension of facilities is not available in cases where service of summons by solicitor has been requested. In such cases, the existing rules about applications for an order for substituted service could be resorted to, or presumably a failure to achieve results might induce the plaintiff's solicitor to lodge the summons in court for service by bailiff.

A minor reform is that (apart from service by post, as indicated above) the *personal* service of a default summons may now be effected by any officer of the court, not necessarily by a bailiff, if it happens that the defendant attends at the court office (amendment to Ord. VIII, r. 2 (*b*) (i)).

Except as to the costs to be allowed, there is no change as respects the entry of judgment in default of defence under Ord. X, r. 2. In consequence of the changes effected by the Fees Order, already in force, there is now no fee at this stage (except in transitional cases), and the new item for solicitor's costs is five shillings, whatever the amount of the claim (new Appendix D, Part II, para. 1 (*a*)).

Where the defendant in a default action files an admission with an offer of payment, the plaintiff will now first be given

an opportunity of considering the offer and saying whether he accepts it or not. If he accepts it, judgment will be entered accordingly "as soon as practicable," without any further attendance at the court. If not, the present disposal procedure will be followed (Ord. X, new rule 4). The plaintiff is expected to send notice of acceptance or non-acceptance within three days of receiving notice from the registrar of the admission. If the plaintiff fails to do either, the registrar will presumably adopt the disposal procedure. It does not seem that he should conceive himself as entitled, by reason of the plaintiff's silence or default, to enter judgment in accordance with the defendant's offer without further consideration. There is some possible uncertainty as regards costs, the new Appendix D, relating to fixed costs, referring only to an allowance when judgment is entered in a default action "on disposal" (Part II, para. 1 (*b*): see below). No forms of notice for use by the plaintiff are prescribed. There is a prospect of minor difficulty under the first part of this amended procedure, in that a plaintiff may not always be sure of the date of entry of judgment, to judge the performance of the defendant thereunder in respect of (say) the payment of monthly instalments.

If part only of the claim is admitted by the defendant, the procedure mentioned above will also afford the plaintiff an opportunity of accepting such admitted amount in satisfaction of his claim. If not accepted, a date for the hearing of the action will be fixed, and notice given to the parties accordingly.

The substituted r. 4 does not so provide, but there seems no reason why a plaintiff should not, in appropriate circumstances, elect to accept in satisfaction the amount admitted but refuse the defendant's proposal for payment, or vice versa.

The solicitor's costs allowed on entry of judgment on disposal are—

	s.	d.
Claim over £2 and not exceeding £10	7	0
Claim over £10	10	0

(new Appendix D, Part II, para. 1 (*b*)).

If the defendant delivers a counter-claim, even if at the same time he admits the claim or part of it, the action will be treated as a contest, and notice of the date of hearing given accordingly.

It is now possible for a plaintiff to obtain further and better particulars of defence in a default action without resort to a general application for directions under Ord. XIII, r. 3. This is effected by applying the provisions of Ord. IX, r. 4 (6) to (9), to default actions (Ord. X, r. 9, as amended).

Ordinary Actions

Where the plaintiff's claim is for the delivery up of goods let under a hire-purchase agreement, his particulars of claim to be filed must now additionally state:—

(i) the amount of the unpaid balance of the hire-purchase price;

(ii) the amount (if any) claimed *as an alternative* to the delivery of the goods; and

(iii) the amounts (if any) claimed *in addition* to the delivery up or alternative money claim (Ord. VII, substituted r. 7A).

Where the sole object of an action is to obtain the court's sanction to a proposed settlement or compromise in a case where the claimant is an infant, or otherwise under disability, the particulars of claim must contain a brief statement of the cause of action, together with a request for the approval of the settlement or compromise. The required sanction may be given by either the judge or the registrar sitting in chambers, whether on a court day or not (Ord. V, r. 19, new para. (*2*)). A fixed fee of ten shillings is payable on the entry of a plaint in such an action.

Simplified forms of summonses are also prescribed in regard to ordinary actions—

Form 18 ..	Ordinary summons.
Form 19 ..	Ordinary summons (registrar's court).
Form 20 ..	Ordinary summons (equity proceedings).
Form 21 (1) ..	Possession summons.
Form 21 (2) ..	Possession summons (forfeiture).

And the new form of admission, defence or counter-claim (Form 18A) is to be annexed to Form 18 or 19. But in regard to equity proceedings and possession actions, the form to be annexed (Form 20A) will be a form of defence only, replacing the present form in actions for the recovery of land by which a defendant may admit the plaintiff's title and offer to give possession on a specified day.

The solicitor's costs to be entered on ordinary summonses on issue are similar to those in default actions, viz.:—

	Service not by solicitor £ s. d.	*Service by solicitor* £ s. d.
Claim exceeding £2 and not exceeding £10	10 0	13 0
Claim exceeding £10, or in possession cases	1 0 0	1 8 0

In an action for the recovery of property other than land or money the "claim" is the value of the property claimed, or in the case of goods supplied under a hire-purchase agreement the unpaid balance of the hire-purchase price (new Appendix D, Part I).

The new Amendment Rules do not adopt the committee's recommendation to permit the service of ordinary summonses by A. R. registered post, and the only modification on this subject is that such summonses may now be served by the plaintiff's solicitor or a process server in the same way that default summonses may now be served, but such service must be personal (Ord. VIII, r. 8 (1), as amended). The alternative methods of service, in particular by post following a report by the bailiff—available in ordinary actions under Ord. VIII, r. 8 (1A) and (1B)—cannot be employed in such circumstances.

A revision of Ord. VIII, r. 31, will enable successive summonses to be issued, when this is necessary to maintain the proceedings, at any time and from time to time during twelve months from the date of issue of the original summons, and this period is capable of being extended for twelve months, and similar successive periods, on application whilst still current and provided "reasonable efforts have been made to serve the summons" within the relevant period and service has not been effected. A fee of five shillings, or the original plaint fee if less, is payable on the issue of a second or subsequent successive summons.

Where the defendant in an ordinary action files an admission and makes an offer which is accepted by the plaintiff, judgment will be entered as soon as practicable, without waiting for the date fixed for the hearing of the case, or requiring the formality of the plaintiff's solicitor attending thereon (Ord. IX, r. 1 (3), as amended). This may result in some uncertainty on the plaintiff's part—to be cleared only by a specific inquiry at the court office—as to the precise date or dates on which instalments will accrue due from the defendant.

If defendants in ordinary actions continue to neglect the opportunity to file an admission where the claim is undisputed,

practitioners will need to give some consideration to the question of preparing for trial in the absence of such an admission, or indeed any pleading or act of the defendant, in ordinary actions for simple money claims where a contest is not normally expected.

The provisions of Ord. XXIII, r. 2 (3), continue in operation and justify the non-attendance of a plaintiff and his solicitor at the hearing where the court has received an affidavit "which is admissible in evidence by virtue of any Act or rule." The normal use of affidavit evidence to date has been by plaintiffs compelled by the provisions as to venue to sue in distant courts. In such cases, Ord. XX, r. 3A, could be utilised where the defendant had not filed a defence. Order XX, r. 3A, is now revoked, but in effect the provisions thereof are widely extended by the amendment of Ord. XX, r. 5. In the result, it will be possible for a plaintiff to tender evidence by affidavit to prove his claim, even in his own court, in any action where the defendant has not filed a defence, the previous requirement of this rule for prior notice of intention to use such affidavit being abrogated in such cases (Ord. XX, r. 5 (2)). This operation can be effected by the delivering or filing of the affidavit before the date of hearing, or apparently even by post, and attendance at the hearing itself is unnecessary (Ord. XXIII, r. 2 (3), above). But experience and experiment may suggest the unwisdom of adopting this course. The defendant may attend the hearing, although he has no intention of disputing liability and only wants time to pay. He should have filed an admission and offer, but has not done so. If the plaintiff's solicitor does not attend, the defendant will have the field to himself in contending with the court as to the manner in which he is able to discharge his liability. If the registrar in such circumstances thinks it desirable to adjourn the case for the plaintiff or his solicitor to attend, much of the advantage from the amendment of the rules will be negatived by the substantial mischief and costs of adjourned cases. It may well be that the plaintiff's solicitor will find it desirable to attend court on the hearing of such an action, armed with an affidavit in the form of a simple proof of debt. By this method the attendance at court of a witness to give oral evidence of a debt, very often of small amount, will be avoided.

This possible feeling of uncertainty as regards the hearing of ordinary actions extends to the costs to be allowed to the plaintiff's solicitor in respect thereof. If judgment is entered on the defendant's admission and the plaintiff's acceptance of his offer of payment, the allowance will be—

	s.	d.
In the case of claims over £2 and not exceeding £10	7	0
In the case of claims over £10	10	0

(Appendix D, Part II, para. 1 (*b*)). It may be considered that a different sum (e.g., that next mentioned) is allowable where the defendant files an admission with an offer which is not accepted, and an order is made for payment *otherwise* than in accordance with the offer, e.g., by larger monthly instalments. When judgment is given in an ordinary action where "the defendant has not delivered a defence and does not appear at the hearing to resist the claim," there is a fixed allowance for solicitor's costs of £1, but only when the claim exceeds £10 (*ibid.*, para. 1 (*c*)). It appears that in such cases when the claim is over £2 but less than £10, item 4 of Scale 1 of the new scales of costs (Appendix B), viz., 10s., will be allowable without taxation (see Ord. XLVII, r. 37 (1), as amended).

Other Originating Process

It is now made clear that originating applications may be amended before service, e.g., if not served by reason of error in or omission from the application, or the respondent's removal from the stated address. In such cases, an amended originating application may be filed (Ord. VI, r. 4 (2), new sub-para. (*e*)). Moreover, in case of non-service, one or more successive originating applications may be issued, in the same way as summonses in ordinary actions (*ibid.*, new sub-para. (*f*), applying Ord. VIII, r. 31 (1) to (5)).

Interim Applications and Proceedings

A party desiring to obtain discovery of documents by his opponent should first give notice in writing requiring an affidavit of documents, and it is only on the other side's failure to comply within three days of service that application should be made to the court for an order therefor (Ord. XIV, r. 2, as amended). The application will be made on notice, as hitherto, and may be made without previous request out of court if there are "reasonable grounds" for doing so.

Reference has already been made above to the extended provisions for the use of affidavit evidence, by the revocation of r. 3A and the amendment of r. 5 of Ord. XX. In addition, r. 4 has been amended so that the powers thereunder may be exercised by the registrar as well as the judge, but subject to an added proviso specifying the right of the judge at the hearing to refuse to admit affidavit evidence tendered under an order, whether made by himself or the registrar, if "in the interests of justice he should think fit to do so."

Hearing

Effect is not yet given to the committee's recommendation for the general extension of the jurisdiction and powers of the registrar as regards the trial of actions.

The provisions of Ord. XXIII, r. 1 (1), have been amended to make it clear that the registrar has power (about which doubts have been expressed) to deal with claims for the return of goods where the value, or the unpaid balance of the hire-purchase price, does not exceed £10.

Enforcement of Judgments

The Austin Jones Committee discussed at length the question of the efficacy of judgment summons proceedings, and made recommendations. It has apparently not been considered proper yet to adopt these, except in three respects:—

(*a*) A new simplified form of judgment summons (Form 171) is prescribed.

(*b*) Order XXV, r. 41, is amended to authorise the issue, if necessary, of more than one successive judgment summons over a period of six (instead of three) months of the date of the original judgment summons (Ord. XXV, r. 41, as amended).

(*c*) The position as to costs is clarified (*ibid.*, substituted r. 66).

Allowances to Witnesses

The Amendment Rules include a new Appendix C specifying the compensation for loss of time to be allowed to witnesses. This contains figures which are higher in some respects than those replaced, but it has to be read in conjunction with a new r. 29 of Ord. XLVII. This gives effect to the committee's recommendation that a witness who does not in fact suffer any loss of wages, earnings or income by reason of his attendance at court should not be allowed the full sum mentioned in the table as applicable to the class of persons of which he is a member. He should not, in such circumstances, unless the court otherwise orders, be allowed more

than the prescribed sum to be paid or tendered at the time of serving a witness summons (col. 1 of the table). Moreover, a similar principle is to be acted upon in the case of witnesses who are away from home, or who have lost wages, earnings or income by reason of their attendance at court, for a period of not more than four hours. The table consists of maximum and not fixed allowances, and the witness is to be allowed " such sum as the judge or registrar thinks reasonable."

In the case of expert witnesses, there is no general increase in fees for qualifying or attending court, but where the judge certifies that the present maximum, whether for qualifying, for a report in writing, or for attending court, should be exceeded, the assessment of the increased fee is to be made by the registrar (Ord. XLVII, r. 30 (2), as amended).

As an inducement to use reports in writing from expert witnesses, and so to avoid witnesses' fees, the maximum fee for such a report is increased to £3 3s., this latter being subject to increase on the judge's order, as mentioned above.

COSTS

The prescribed scales of costs (Appendix B) are completely reorganised. In place of lower and higher scales, there will be three new scales, numbered 1, 2 and 3 respectively, viz. :—

As respects a sum of money exceeding £2 and not exceeding £10	Scale 1
As respects a sum of money exceeding £10 and not exceeding £20	Scale 2
As respects a sum of money exceeding £20 ..	Scale 3

In general, there is no change in the rules governing the applicability of these scales. There are two modifications. In detinue cases, there is now no scale applicable by rule, as previously, determined by the value of the goods concerned, and a determination by the court is required in each case according to the circumstances (Ord. XLVII, r. 10 revoked). The court's discretion to fix a higher scale is now limited to cases in which it is certified that a difficult question of law or a question of fact of exceptional complexity is involved (Ord. XLVII, substituted r. 13).

The detailed items in the scales follow closely the recommended scales contained in the committee's final report. Where there is any variation, it is in the way of an increased maximum figure.

The shorter scales will destroy a certain amount of automatic preparation of bills of costs for taxation. The wide margin between minimum and maximum allowances in the more substantial items will call for careful consideration of claims by solicitors—unless, of course, the line of least resistance is followed by always inserting the maximum—and considered assessment by registrars. For example, item 6 in Scales 2 and 3 relating to preparation for trial of action or matter ranges from £1 to £3 on Scale 2 and from £2 to £15 on Scale 3. This is intended to " cover the work of preparing for trial not otherwise provided for, namely, considering facts, evidence and law, preparation of notes of facts or argument, interviewing witnesses and taking proofs of their evidence, preparing and serving notices to produce and admit documents, perusing correspondence and notices to produce and admit documents and, where counsel is instructed, instructions for and drawing brief, attending counsel therewith, and appointing and attending conference "—so that some regard must obviously be had to how much of this work was necessarily performed in the case under review, and its worth assessed, without advantage of itemised charges.

The present maximum fee to counsel with brief is raised to ten guineas (£11 with clerk's fee) on Scale 3, instead of the proposed eight guineas (item 27).

There is now no general increase of 50 per cent. on profit costs in relation to claims exceeding £20 (Ord. XLVII, r. 41 revoked).

The judge may, if " satisfied from the nature of the case or the conduct of the proceedings that the costs which may be allowed may be inadequate in the circumstances," direct that the prescribed scale of costs shall not be binding on the registrar on taxation. Thereupon, the registrar has a discretion to allow such larger sums as he thinks reasonable in respect of certain specified items, which include instructions to sue or defend, preparing particulars of claim, preparing for trial, attending court on trial, and counsel's fee on trial (Ord. XLVII, r. 21, as amended). In regard to these discretionary increases, the registrar, in the exercise of his discretion, has to take into consideration " the other charges and disbursements to the solicitor and counsel . . . in respect of the work to which the fee or allowance applies, the nature and importance of the action or matter, the amount involved, the interest of the parties, the general conduct and costs of the proceedings and all other circumstances " (Ord. XLVII, new r. 16).

G. M. B.

Costs

DIVORCE—III

WE have now dealt with many of the legal points which arise in relation to costs of divorce actions, and we have been asked to give some indication of the amount of costs likely to be involved in such actions.

One of the difficulties with which one is confronted in these matters is to forecast with any degree of accuracy the probable amount of costs where one has no knowledge, until the action is concluded, of the force and volume of the opposition. Forecasting the amount of costs is always a difficult and unsatisfactory matter, and since in divorce work there is normally no financial background, the parties are always inclined to look with a very critical eye on any serious deviation from the estimate which the solicitor has been induced to give at the outset.

It is impossible to give even an approximate estimate of the amount of costs likely to be incurred unless one knows at the inception of the matter whether or not the case is likely to be defended. If it is defended, then the costs might well amount to a very large sum, dependent, mainly, on the number of witnesses to be called, the distances they will have to travel and their social status. The number and quality of the counsel to be engaged, the difficulty of collecting the evidence, the number and length of the documents to be produced and other matters of a like nature will all have a bearing on the amount of the costs likely to be incurred.

These observations refer in particular to the costs which may be incurred by the opponents, and the amount of the client's solicitors' own bill will not present so much difficulty, except that without knowing the strength of the opposition it is sometimes difficult to predict the amount of evidence that one will have to adduce in order to rebut the allegations of the opposite party.

We will, however, in the first place, take a simple case of an undefended divorce suit, for here the steps taken and the costs involved will in the majority of cases run very much to pattern. It will be readily apparent that one cannot attempt

to estimate the probable costs of an action, whether it is a divorce action or any other type of action, unless one knows something of the procedure. We will assume, therefore, the comparatively simple and by no means uncommon case of a husband who desires to secure a divorce from his wife on the grounds of her adultery, and we will assume further that the adultery is not disputed, and that the case is therefore undefended.

The first step in the proceedings is the drawing, settling and filing of the petition and the affidavit in support. It is customary to have the petition, if not the affidavit also, settled by counsel, and for this purpose he will normally be paid a fee of one or two guineas. When settled, the petition will be copied and served on both the respondent and the co-respondent by post, and the affidavit, when sworn, will be filed. The cost of this in the way of professional fees, for drawing and engrossing the petition and affidavit, making the necessary copies, attending on counsel, and attendances on filing and serving the petition, will amount to between £6 and £7 including the authorised increase of 50 per cent. Counsel's fees for settling, commissioner's and filing fees will amount to £3, making a total of between £9 and £10.

If personal service has to be effected by an agent then the additional charges, including the agent's fee and affidavit of service, will be about £4.

Following the service of the petition it is customary to take counsel's advice as to the evidence required, and the cost of this, including a fee to counsel, will amount to about £4.

Having obtained counsel's advice, the next step is to interview the witnesses and obtain proofs of their evidence, but the cost of this will be included in the item of instructions for brief, as also will be the charges for perusing the relevant and material documents and correspondence.

After interviewing the witnesses it will be necessary to issue a subpoena for their attendance, unless they can be induced to attend the trial without a subpoena. The cost of issuing and serving a subpoena on two witnesses, including the conduct money paid to them, will amount to another £4. If service is effected through an agent, then the costs will be increased by a further £2 in round figures.

When this stage is reached the next step in the proceedings will be to obtain the registrar's certificate, and to set the case down for trial. This procedure, including the necessary attendance and the court fee of £3 10s. on setting the action down, will account for another £5.

So far the items in the bill are scale charges in accordance with Appendix N of the Supreme Court Rules, and although they are subject to some elasticity, the variations between one case and another will not be great. We now come to charges which are discretionary, however, with the result that the sum will vary considerably according to the amount of work done, and for this reason it is not possible to state with any degree of precision the probable amount of costs in any particular case unless one knows beforehand exactly what work is to be performed. Since this is not a practical possibility it is never wise to be too definite about the probable amount of the costs which are likely to arise.

The next stage in the proceedings is the preparation of the brief to counsel, and the fee for instructions will, as we have stated, include the solicitor's fee for attending on the witnesses, and perusing the relevant documents. If, as we will assume here, there are two witnesses, one of whom might be the receptionist or manager of an hotel who will prove the entry in the hotel register, and the other a chambermaid who will prove that intimacy between the respondent and the co-respondent took place, and that the letters or other relevant documents are not voluminous, then a fee of say 7 to 10 guineas would be adequate. The charge for drawing and copying the brief and proofs will, of course, depend on the length, and the charge is 1s. 4d. per folio. Counsel will also be provided with a copy of the petition, the affidavit in support and the relevant documents, the charge for copying being 4d. per folio of 72 words.

In an undefended divorce case it is unusual to engage more than a junior counsel, and the fee normally marked on the brief is 5 guineas, although 7 guineas are sometimes paid. In the present case, which we have assumed to be a simple one, a fee of 5 guineas would probably be adequate, and on this assumption, and on the assumption that a fee of 7 guineas has been charged as instructions for brief, the cost of drawing the brief to counsel and making the copies of the necessary documents and attending on counsel therewith and in conference would be about £25, including counsel's fee of 5 guineas.

The charge for attending the hearing, including the authorised increase of 50 per cent., would be £4 14s. 6d. provided the case lasted the whole day, but this would be unusual in an undefended divorce action, and normally a fee of £1 11s. 6d. is chargeable, plus 50 per cent. A full day's fee is, however, justified where the case is in the list but is not reached until the afternoon.

The decree *nisi* and the decree absolute, with the appropriate court fees, would account for a further £3 to £4, whilst a further fee of say, £4 may be added to cover the charges for searching the list, term fees and letters and petties.

If these various items are added together it will be found that they indicate that the costs in relation to a simple undefended divorce suit amount to a minimum of from £60 to £70, and if it is desired to include the cost of drawing and taxing the costs then a further £3 to £4 should be added.

It will be appreciated that this estimate of the costs of an undefended divorce action of a simple nature represents the minimum, and indeed is the likely amount of the party and party costs. It includes nothing in the way of attendances on and correspondence with the client to advise him, and in normal cases £10 to £15 might be added for this.

To the above items must also be added something to cover the expenses and loss of time of the witnesses, and so far as these are concerned, they will be entitled to their reasonable travelling expenses, subsistence, and something to cover their loss of time. All this will, of course, depend entirely on the circumstances of the particular case, such as the distance that the witnesses have to travel, whether they are forced to remain at the place of trial overnight, and their social status and earning capacity.

Where an inquiry agent is employed to obtain evidence of adultery his reasonable and proper charges and expenses will be allowed on taxation, provided the inquiry agent actually attends to give evidence. If he is employed merely to obtain witnesses who will give evidence, then his charges will be deemed to be covered by the solicitors' fee of instructions for brief. A reasonable fee for an inquiry agent would be about two guineas a day with, in addition, his proper and reasonable disbursements.

It is impossible to give anything more than an example of an estimate of costs in a simple case, and if the proceedings are more involved then the costs will be proportionately increased, and in the case of a defended divorce action it may be necessary to engage two counsel. The justification for three counsel arises only in rare instances, but it is not unheard of (see *Hartopp* v. *Hartopp and Cowley* (1904), 20 T.L.R. 216).

J. L. R. R.

A Conveyancer's Diary

UTILITY OF ATTORNMENT CLAUSES

If the rent reserved by an attornment clause is of a nominal amount the clause has a limited utility in that it provides the means for recovering possession of the mortgaged premises from a mortgagor in possession under the summary procedure made available by the Small Tenements Recovery Act, 1838. But despite the constant inclusion of attornment clauses in mortgage deeds it is very rare for a mortgagee to take advantage of the Act of 1838, an originating summons in the Chancery Division being the mode of procedure usually preferred when possession is sought; why, then, the clause should still be regarded as part of the common form of a mortgage deed is something of a mystery. If the Act of 1838 is disregarded the clause is completely useless; and that on occasion its inclusion may be a source of embarrassment to the mortgagee is made apparent by the decision in *Portman Building Society* v. *Young* [1950] W.N. 372.

When it first became the practice to include an attornment clause in mortgages of land the clause had, of course, a considerable value from the mortgagee's point of view. By creating the relationship of landlord and tenant between the parties it made it possible for the mortgagee to exercise the remedies available to a landlord, and these included the valuable remedy of distress upon the mortgagor's goods in the event of default in the payment of the rent stipulated by the attornment clause. If the rent was made equivalent in amount to the yearly interest, any default in payment of interest automatically made the remedy of distress available. But s. 6 of the Bills of Sale Act, 1878, provided that every attornment whereby a power of distress was given by way of security for any debt or advance, and whereby any rent was reserved or made payable as a mode of providing for the payment of interest on such debt or advance, should be deemed to be a bill of sale of any personal chattels which might be seized under such power. It was not long after the passing of this Act that the applicability of this provision to the usual attornment clause was made apparent (see *Re Willis* (1888), 21 Q.B.D. 384); it was clear that the purpose of reserving a substantial rent by such a clause was to provide an additional security for the payment of interest on the amount advanced, and this was precisely the sort of transaction which it was intended to catch by s. 6 of the Act. The result was to render an attornment clause ineffective, unless registered under s. 9 of the Act of 1878, in so far as it conferred a power of distress upon the mortgagee.

But the terms of the Act did not wholly invalidate the operation of the clause. As Lord Coleridge, C.J., pointed out in *Mumford* v. *Collier* (1890), 25 Q.B.D. 279, 282, the Act did not make an attornment a bill of sale; it provided that it should be deemed to be a bill of sale of any personal chattels which might be seized under the power of distress conferred by the attornment, and in his judgment, where no personal chattels were seized, s. 6 did not affect the operation of an attornment clause in so far as it created the relationship of landlord and tenant between mortgagee and mortgagor. In that case a mortgagee under a mortgage containing an attornment clause in the usual form issued a writ against the mortgagor specially indorsed under R.S.C., Ord. III, r. 6, with a claim for the recovery of the land comprised in the mortgage, and an order was made in his favour for possession under Ord. XIV in the face of the mortgagor's objection that the effect of the Act of 1878 had been to render the attornment clause wholly void unless registered.

After the decision in *Mumford* v. *Collier*, *supra*, an attornment clause was thus useful as enabling a mortgagee to proceed to summary judgment on a writ specially indorsed for possession of the premises. As Ord. III, r. 6, stood at that time, there were only three types of claim which came within its provisions: the recovery of a debt or a liquidated demand in money, the recovery of possession of a specific chattel, and recovery of possession of land by a landlord against a tenant whose term had expired or been determined. The existence of a landlord and tenant relationship was a condition of the availability of the procedure under this rule if the claim was a claim to the possession of land.

In 1929, however, Ord. III, r. 6, was amended by the insertion of a paragraph enabling a plaintiff claiming possession of any property forming a security for the payment of money to indorse his writ specially, and it is no longer necessary to rely on a landlord and tenant relationship in order to take advantage of the rule. This amendment thus abolished the procedural advantage with which an attornment clause had up till then invested a mortgagee.

There remained (and still remains) the Small Tenements Recovery Act, 1838. By s. 1 it is provided (so far as material) that as soon as the interest of the tenant of any house held by him at will, either without being liable to the payment of any rent or at a rent not exceeding £20 a year, is determined, and such tenant neglects or refuses to quit and deliver up possession of the premises, proceedings to recover possession in accordance with the terms of the Act may be started against the tenant; and if those terms (which are somewhat complicated as regards the notice required to be served on the tenant, but otherwise fairly straightforward) are duly complied with, the justices have no option but to issue a warrant to the police ordering them to enter the premises and give possession to the landlord or his agent. The conditions which have to be fulfilled under this section before an order can be made are, therefore, as follows: (1) the premises must be a house; (2) the rent reserved by the attornment clause must not exceed £20 a year; and (3) the mortgagor's interest *qua* tenant of the premises must have expired or determined. The service of the necessary notice upon the mortgagor in his capacity as tenant under s. 1 of the Act of 1838 will operate as a re-entry by the mortgagee, if the term or interest created by the attornment clause has not by then been determined by some other means or in some other way (*Woolwich Equitable Building Society* v. *Preston* [1938] Ch. 129), and no express notice to quit is therefore necessary before the machinery of the Act is put in motion; and unless the attornment clause itself makes the determination of the mortgagor's term or interest thereunder conditional upon some default on his part, no such default need have taken place; there is nothing about default in s. 1 of the Act. The procedure provided by the Act was successfully used by a mortgagee, in the capacity of landlord under an attornment clause in common form and reserving a nominal rent, in the well-known case of *Dudley and District Benefit Building Society* v. *Gordon* [1929] 2 K.B. 105.

In *Portman Building Society* v. *Young*, *supra*, the mortgagor of a dwelling-house by a mortgage as subsequently varied by a deed of variation attorned tenant to the mortgagee at the monthly rent of £9 16s., which was the amount of the monthly repayment of principal and interest agreed upon between the parties. The mortgagor failed to keep up the instalments

and the mortgagee commenced an action by summons in the High Court for possession of the premises. The objection was then taken by the master (the mortgagor being unrepresented) that the tenancy created by the attornment clause, being a tenancy at a rent not less than two-thirds of the rateable value, came within the protection of the Rent and Mortgage Interest Restrictions Acts, and that an order for possession could only be made under those Acts. This objection was upheld by the judge, with the result that the plaintiff society was deprived of its costs (under s. 17 (2) of the Act of 1920 the jurisdiction to deal with any claim arising out of the Act is conferred upon the county court, and it is provided that a person taking proceedings in the High Court which he could have taken in the county court is not to be entitled to recover any costs). This was a small matter, perhaps, but it should not be overlooked that a "letting" of this kind may have the effect of fixing the standard rent of a house at an unduly low figure. Moreover, the existence of a tenancy created by an attornment clause may easily be forgotten after its termination by the payment off of a mortgage debt; but if the tenancy was a tenancy at a substantial rent, it is now clear as the result of this recent case that it should be disclosed in reply to the usual enquiries relating to controlled tenancies upon a subsequent sale of the premises. The consequences of a failure to disclose this information may be serious. Now that the rent restriction legislation has become a more or less permanent addition to the statute book, the burden which an attornment clause reserving anything more than a nominal rent may throw upon a vendor on the occasion of a subsequent sale is thus considerable. Perhaps this thought will do something to limit, if not entirely to abolish, the continued use of the attornment clause.

"A B C"

Landlord and Tenant Notebook

HOW DID MR. PICKWICK'S TENANCY DETERMINE?

In so far as the fortunes of the hero of the Pickwick Papers were affected by the law, those in which the law of husband and wife, the law relating to magistrates, and that concerned with execution of judgments played a part have attracted most interest. Certain of his actions were governed, however, by the law of landlord and tenant. In their case all went smoothly, and as happy marriages don't make news (a Fleet Street maxim) little is said about them. But in the course of this discussion I intend to suggest that things might have worked out differently, and I submit that the Long Vacation is a suitable occasion for dealing with an academic question of this nature. The question is, briefly, whether a certain tenancy was determined by notice to quit or by surrender.

The tenancy I have in mind is that of apartments in Goswell Street, the parcels, described in Chap. XII of the Posthumous Papers of the Pickwick Club, consisting of two rooms forming part of a dwelling-house. It may be that the agreement negotiated *via* Mr. Roker in Chap. XLII, when Mr. Pickwick decided to have a room to himself in the Fleet Prison, amounted to a tenancy agreement (exclusive possession of a room at a rental of £1 per week); that question is, however, both too academic and too deep for this occasion. The Goswell Street holding is, I think, rightly to be considered the subject of a tenancy, both because the grantee's position is impliedly contrasted with that of another inmate of the house, described as a lodger; because the remark "Mr. Pickwick's will was law" negatives the suggestion that the landlord retained dominion and control in his case (see *Kent* v. *Fittall* [1906] 1 K.B. 60 (C.A.); *Honig* v. *Redfern* (1949), 93 Sol. J. 405; article at 93 Sol. J. 369); and because of the steps taken to determine the relationship described in Chap. XXVI, with which this article is immediately concerned.

The landlord under the agreement was Mrs. Bardell and the parties were, by this time, figuratively speaking, at arm's length. But Mr. Pickwick never satisfactorily learned the advisability of acting through his solicitor, and one evening (assisted by two pints of port) he wrote out a month's notice to quit, which, according to him, would terminate the tenancy. He handed this document to his servant or agent, one Weller, for service, and in the same breath he mentioned rent in these terms: "... there is some rent to pay. The quarter is not due till Christmas, but you may pay it, and have done with it."

Habendum and reddendum need not correspond as regards period; it is not repugnant to the nature of a tenancy from year to year to include a provision that it may be determinable by a notice to quit less than six months in length (*Allison* v. *Scargall* [1920] 3 K.B. 443); a weekly tenant may be entitled to a month's notice by the terms of the particular agreement (*Doe d. Peacock* v. *Raffan* (1806), 6 Esp. 4, N.P.). So we may assume that the Pickwick tenancy, though yearly or quarterly, made special provision for determination by one month's notice to quit.

But when Mr. Pickwick decided to pay rent before it was due he was certainly taking a step which his legal adviser would have deprecated. Indeed, it would have been pointed out that the payment was not a payment of rent at all, but payment of a sum in gross (*Cromwel* (*Lord*) v. *Andrews* (1583), Cro. Eliz. 15); and that if Mrs. Bardell should assign the reversion before Christmas the assignee might recover the same amount from Mr. Pickwick when that festival came round (*De Nicholls* v. *Saunders* (1870), 22 L.T. 661). However, no such assignment, voluntary or involuntary, occurred, and on the strength of the authority last referred to Mr. Pickwick, if a claim had been made by Mrs. Bardell, would have been able to set up that he had in this case made an advance with an agreement that the said advance should, when Christmas came, be treated as fulfilment of his obligations in the matter of rent. Mrs. Bardell's reaction to the payment, which she accepted (there could be no question of it having been merely tendered, as she subsequently handed Mr. Weller some change as well as a receipt), and to a further communication, with which I am about to deal, was to observe that Mr. Pickwick had, in every respect but one, behaved himself like a perfect gentleman.

This warrants the proposition that the further communication, in Mr. Pickwick's words to his agent: "... and tell Mrs. Bardell she may put a bill up as soon as she likes," and in Mr. Weller's to her: "... you may let the place as soon as you like," was not intended to trap Mrs. Bardell. At all events, if this was the intention, the ruse failed; for according to the opening speech of counsel who appeared for her in her action for breach of promise of marriage (Chap. XXXIV) the position, since the determination of the Pickwick tenancy (which had lasted two years) was then "The bill is down—but there is no tenant ... All is gloom and silence in the

house." As the notice to quit had by then expired (the hearing was on a 14th February) one may assume that Mrs. Bardell's failure to re-let was due to her distressed state of mind ("to see how dreadful she takes on, going moping about, and taking no pleasure in nothing" was how her friend Mrs. Cluppins had described her condition on the occasion of the delivery of notice to quit). But one likes to think as regards the period between that occurrence and the expiration of the notice that she may have been guided by advice based on the then fairly recent decision in *Redpath* v. *Roberts* (1800), 3 Esp. 225, N.P. In that case a landlord had, on his yearly tenant quitting on Midsummer Day without notice, put up a bill to let the apartments and yet been held to be entitled to recover rent for the period till Christmas. The mere quitting was described as "equivocal" by Lord Kenyon, C.J.; later, after full examination of existing authorities, the Court of Exchequer laid down, in *Lyon* v. *Reed* (1844), 13 M. & W. 285, that a surrender "by operation of law" is effected only when the owner of an estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and decided that a demise to a stranger with the consent of the lessee in possession did not have that effect. For a recent application of this see *Foster* v. *Robinson* [1950] 2 All E.R. 342 (C.A.); 94 SOL. J. 474. Estoppels are mutual, so it may well be that if Mrs. Bardell had acted upon the message and let to someone else she might have found herself defendant in an action brought by Mr. Pickwick. Another case in which bills were actually put up (and the premises advertised as being to let) was *Oastler* v. *Henderson* (1877), 2 Q.B.D. 575 (C.A.), the landlords succeeding in establishing that, though the keys had been handed to them and they had actually used part of the house, their possession had not been so inconsistent with the continuance of the term as to effect a surrender. Mr. Pickwick had, of course, been absent from his apartments for some time before he sent his servant to deliver notice to quit and messages, and one can understand that the unexpected writ would make him disinclined to resume occupation. But, even if one recalls that Mr. Weller, on the occasion mentioned, had instructions to and did collect and remove effects left on the premises by his employer, it seems doubtful whether he or anyone deriving title under him could be said to have been estopped from asserting that the term continued till Christmas, and in my opinion the correct answer to the question forming the title of this article is "by notice to quit given by the tenant."

R. B.

HERE AND THERE

THE PRIVY COUNCIL'S FUTURE

THE shrinkage, so marked of late, in the superficial area over which the Judicial Committee of the Privy Council dispenses final justice in infallible, or at any rate irrefutable, pronouncements has given rise to the gloomiest and most depressing forecast as to the future of that section of the legal profession who till so recently held the gorgeous East in fee. But never say die. Generation after generation, legal business has always seemed to contemporary practitioners to be no longer what it was—going, going from bad to worse—practically gone. But something always turns up. As a matter of fact in the term before the Summer Vacation Privy Council business was particularly brisk and made incessant demands on the presence of the Law Lords. This was partly due to the urgent and totally unforeseeable conundrum that the Rev. Mr. Macmanaway managed to propound for the racking of their lordships' brains. But there's plenty more to come. The remaining Privy Council preserves seem likely to breed game enough for the hunters. Current international complications look like providing them with some material if not to close, at any rate to narrow, the economic gap yawning where once lay piled the litigious riches of the Indies.

CASES COMING?

I HAVE not noticed any recent news of the aircraft for which the Americans were contending with the new Communist Government of China. When last seen they were heading from the Hong Kong courts in the general direction of the Privy Council lists but I have no actual news of their arrival there. Then there's "Turco" Westerling, the Dutch soldier of fortune whose private army—"The Host of Heaven"—recruited from Dutch deserters, Eurasians and Moslem fanatics for a while made hay of the newly established Indonesian Republic, at one time capturing Bandoeng, a city of 180,000. When he slipped out of Java to Singapore to seek money and arms to carry on the revolt he was arrested, and ever since then the Indonesian Government have been hot on his trail by every legal device to get him extradited on charges of murder and war crimes. In the Supreme Court at Singapore it has been held that the Anglo-Netherlands Extradition Act, 1879, does not apply to Indonesia and while that decision stands he is safe. Can the Indonesians appeal? It seems doubtful, but they are reported to be planning to see what the Privy Council can do for them. If they do they will find Turco conveniently on the spot, for he is reported to be flying to London with what, in present circumstances, might well become a fashionable scheme for the adventurous, "a volunteer body to save world peace." Another Singapore decision of which we may well hear a little more in London is the case of the thirteen-year-old Dutch girl, brought up in the Malay jungle during the Japanese invasion, who has just married a Malay school-teacher. Her parents, who were interned during the war, could not trace her when they were released. Now they want her returned to them. One Singapore court decided in their favour. On appeal the decision was reversed. The father declares that he will fight for her "to the last breath." If he does it looks like another case for the Judicial Committee.

HOLIDAY NOTE

IF you're thinking of going to Italy do remember to do as the Romans do or else budget for the consequences in your travelling allowance. Sir Alan Herbert, in a lyrical outburst on our own tourist industry, once wrote:—

> "Come to Britain and lead a gay life
> As a rule it's illegal to bathe with your wife."

In Rome you mustn't kiss in public—even your wife. Penalty 30s. A slip of the bathing trunks may be even more expensive. Even statues, so they say, are being fitted with cunning stone "fig-leaves." The Mediterranean peoples are so inflammable.

RICHARD ROE.

Mr. R. P. OWEN, assistant solicitor to Berkshire County Council, has been appointed assistant solicitor to Leicestershire County Council.

Mr. F. W. WARD, assistant solicitor to Ipswich Borough Council, has been appointed senior assistant solicitor to Grimsby Borough Council.

NOTES OF CASES

COURT OF APPEAL

DISCOVERY: LETTERS BETWEEN DEFENDANT AND INSURER

Westminster Airways, Ltd. *v.* Kuwait Oil Co., Ltd.

Singleton and Jenkins, L.JJ. 14th July, 1950

Appeal from Parker, J.

The plaintiffs alleged that their aircraft had been damaged by the negligent driving of the defendants' lorry and claimed damages. The master ordered the defendants to produce correspondence between them and their insurers. The defendants objected to producing any documents passing between them and their insurers which had come into existence after litigation was in contemplation and for the purpose of furnishing the defendants' solicitors with material for their use in conducting the defence to the action. Parker, J., allowed their appeal against the master's order. The plaintiffs appealed.

SINGLETON, L.J., said that the plaintiffs contended that the documents in the schedule to the affidavit were not privileged and further that the court ought to look at them before deciding they were privileged. Parker, J., did not think it necessary to do so, nor did he. The court ought to regard the defendants' affidavit as covering the question unless there were some reason to cast doubt upon it. The defendants had disclosed documents up to a time when it was clear that litigation was imminent. The documents thereafter came into existence for the purpose of providing information on which the defendants' solicitors could meet any claim which was made. The plaintiffs relied on *Jones* v. *Great Central Railway Co.* [1910] A.C. 4, which, however, was different from the present case. *Anderson* v. *Bank of British Columbia* (1876), 2 Ch. D. 644, was also distinguishable. The cases cited by the defendants were *Birmingham and Midland Motor Omnibus Co., Ltd.* v. *London and North Western Railway Co.* [1913] 3 K.B. 850, and *Adam Steamship Co., Ltd.* v. *London Assurance Corporation* [1914] 3 K.B. 1256. The documents in question fell within the line of authorities relied upon by the defendants rather than that relied upon by the plaintiffs. The claim to privilege was established, and the appeal should be dismissed.

JENKINS, L.J., agreed. Appeal dismissed.

APPEARANCES: *C. M. Shawcross*, K.C., and *J. R. Bickford Smith* (*William Charles Crocker*); *R. M. Everett* (*Hair & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

RENT RESTRICTION: IMMORAL USE OF PREMISES: SUSPENDED ORDER FOR POSSESSION

Yates *v.* Morris

Evershed, Singleton and Jenkins, L.JJ. 14th July, 1950

Appeal from Westminster County Court.

The respondent, a statutory tenant, permitted the demised premises to be used for immoral purposes. The appellant landlords sued for possession on that ground. The county court judge made an order for possession in twenty-eight days "provided no further nuisance occurs." The landlords appealed.

EVERSHED, M.R., referring to *Borthwick-Norton* v. *Romney Warwick Estates, Ltd.* (*ante*, p. 404), said that the Rent Restriction Acts were designed to protect persons in the occupation of their homes at a time of housing shortage. If a statutory tenant were shown to be suffering the premises to be used for immoral purposes, then, *prima facie*, the case was not one which could have been within the protection intended by Parliament. Therefore, he inclined to think, had he been himself trying the case he would have been less charitable to the tenant than the county court judge. The landlord complained that the judge, having first made an order for possession, had no jurisdiction to suspend it, or that, if he had, he ought not to have suspended the order conditionally, in effect, upon the tenant's taking proper steps to see that there was no further improper use of any room. He (his lordship) thought that there was jurisdiction to make an order in this form in a case arising under the Rent Restriction Acts. Whether it was a convenient form was another matter. The intention of the order was that, should there be any ground for saying that immoral use of the premises was going on, then, on application to the court if necessary, the suspension would immediately and automatically cease. The case was different from *Sheffield Corporation* v. *Luxford* [1929] 2 K.B. 180, in which the Rent Restriction Acts were not concerned. The plaintiff there proved that the lease had determined and that he was, according to the law of the land, entitled to immediate possession. The question there arose because the County Courts Act, 1934, gave the court a general power to suspend the operation of its order; but, where there was an absolute right to possession, that discretion, if it were exercised judicially, could only be exercised so as to give reasonable opportunity to the trespassing tenant to remove himself and his belongings from the premises. People could not be expected, or reasonably asked, to go out at two minutes' notice; but in such a case to give a suspension for no particular reason for as long as twelve months could not have been a judicial exercise of discretion. That case was different from this, where the making of an order for possession, whether immediate or to be given in six months' time, or one suspended indefinitely, was wholly in the discretion of the judge.

SINGLETON and JENKINS, L.JJ., agreed.

APPEARANCES: *C. G. A. Cowan* (*Wontner & Son*); *B. St. Q. Power* (*Piper, Smith & Piper*).

[Reported by R. C. CALBURN, Esq., Barrister at-Law.]

CHANCERY DIVISION

VACATION COURT

NUISANCE: CIRCUS IN PUBLIC PARK

Kinney and Another *v.* Hove Corporation and Others

Donovan, J. 11th August, 1950

Motion for an injunction.

The plaintiffs, residents of Hove, complained that the defendant corporation were proposing to enter into an agreement with the second defendants, J. M. S. Chipperfield and Others, circus proprietors, for a circus with a menagerie of wild animals to be held in Hove Park from 10th to 14th September. The park is in the middle of Hove and has an area of 40 acres. It was conveyed to the corporation in 1901, and in the conveyance the corporation covenanted not to use the park in any way which might be a nuisance or annoyance to adjoining owners and to use it as a recreation ground or pleasure park only. The site for the proposed circus was only 100 yards from the plaintiffs' front door, and they, and other adjoining owners who were very anxious to have the amenities of the district maintained, were much opposed to the proposal of the corporation. In their view there was a reasonable probability that a nuisance would be created by the noise of the animals, and by that of bands, generators and loud-speakers, and by the noise of traffic and of the crowds of people assembled in the park. There was also the danger that animals might escape from the menagerie. Affidavits were read on behalf of the second defendants to the effect that none of the animals in Chipperfield's Circus and Menagerie had ever escaped since it was founded 200 years ago and that the circus would not disturb the amenities of the neighbourhood. The mayor

of Hove stated in an affidavit that very careful consideration had been given by the corporation to the proposal to hold the circus and that the site chosen was selected as being the most suitable. The corporation did not view the scheme as a means of financial gain, but as something which would afford pleasure to the inhabitants of the borough and particularly children. Evidence was also given of the restrictions to be imposed on the second defendants with regard to the conduct of the circus. (*Cur. adv. vult.*)

DONOVAN, J., said that in his opinion the holding of the circus would not be a use of the land for a purpose other than that of a pleasure ground, recreation ground or public park within the meaning of the covenant. He was also of opinion that in any event the plaintiffs could not, in law, enforce the covenant entered into by the corporation. With regard to nuisance, as the circus had not yet been held, the present motion was a *quia timet* action to prevent an apprehended nuisance, and he had to be satisfied that the apprehended injury was probable and that, if it happened, it would be substantial. He was not satisfied that the circus would interfere to any substantial extent with the normal recreational facilities in the park; and the stipulations to be imposed on the conduct of the circus would prevent a nuisance. As for the question whether, in spite of the restrictions to be imposed on the second defendants, the noise of the circus would constitute a substantial interference with the comfort of the average person living in the vicinity, he felt a doubt which was reinforced when he was told that there had not been an action of this sort against the circus for the past thirty-eight years, though he did not know whether it had ever been held in a park like Hove Park before. The plaintiffs had not made out their case, though, but for the restrictions imposed by the licence to be granted to the second defendants, he would have been prepared to grant an interlocutory injunction. The plaintiffs agreed to treat the hearing of the motion as the trial of the action, which was dismissed with costs, the second defendants giving certain undertakings as to the use of loud-speakers and generators after a fixed hour. Judgment for the defendants.

APPEARANCES: *Harold Brown* (*Burton, Yeates & Hart*); *G. M. Parbury* (*Town Clerk, Hove*); *G. T. Hesketh* (*Sidney Torrance & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

DIVISIONAL COURT

CONTRACT: REMOVAL OF REFUSE: EFFECT OF NEW BYELAW

Cory (William) & Sons, Ltd. *v.* London Corporation

Lord Goddard, C.J. 4th July, 1950

Special case stated by an arbitrator.

The claimant company in 1936 entered into a contract with the defendant corporation for the removal of refuse by barges. The contract specified a particular kind of barge to be used, and the contractors undertook to observe byelaws made by the corporation as Port of London health authority. In July, 1948, the corporation, as port health authority, made a new byelaw, to come into operation in November, 1950, whereby vessels used for the removal of refuse had to correspond with a modified specification. The cost of altering their barges to conform with the new byelaws would have been such as to render the whole contract commercially impracticable, and the contractors therefore in September, 1948, claimed to be entitled to treat the contract as rescinded. The question left by the arbitrator was whether the corporation's act in sealing the new byelaw amounted to a repudiation of the agreement.

LORD GODDARD, C.J., said that in his opinion the act of the corporation in sealing the new byelaw did not amount to a repudiation of the agreement so as to entitle the contractors to treat it as being determined in September, 1948. The corporation were making a byelaw of general application: it would not apply to the contractors only. It could not be said that, because the port health authority, being entrusted by Parliament with the duty of making byelaws with the object of securing the health of the port, thought it necessary to pass a particular byelaw, they were, therefore, repudiating a contract. It might be that the effect of the byelaw would entitle the claimant contractors to say that the contract would be frustrated when the byelaw came into force in November, 1950, but that did not amount to a repudiation of the contract in 1948. It was not an anticipatory breach of contract. The doctrine of anticipatory breach depended on one party's repudiating his obligation under a contract, in which event the other party was entitled to treat the contract as being at an end. But before there could be a repudiation there must be something in the nature of a wrongful act, which might either be a breach of contract or the commission of a tort. It was impossible to say that the port health authority committed a wrongful act or broke their contract because they imposed a byelaw on the Port of London which would incidentally affect this particular contract. Repudiation must be a conscious act in relation to the contract in question. The fact that the result of the byelaw, when it became effective, would be to frustrate the agreement and prevent its further application as being commercially impracticable from the contractors' point of view did not constitute repudiation, and the contractors were not entitled to treat it as rescinded after September, 1948. Judgment for the respondent corporation.

APPEARANCES: *C. P. Harvey*, K.C. (*E. F. Turner & Sons*); *H. B. Williams*, K.C., and *Wilfrid Hunt* (*Comptroller and City Solicitor*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

HOLIDAYS WITH PAY: RETROSPECTIVE APPLICATION

Master Ladies' Tailors' Organisation *v.* Minister of Labour and National Service

Somervell, L.J. (sitting as an additional judge).
13th July, 1950

Action.

The plaintiffs were an organisation of which the members were employers of workers employed in wholesale mantle and costume making. In July, 1949, the defendant Minister received from the Wholesale Mantle and Costume Wages Council (Great Britain) proposals for requiring workers employed by the plaintiff organisation to be allowed longer holidays than before by their employers, and for fixing remuneration to be paid to them during those holidays. On 25th July, 1949, the Minister made an order which provided that it should take effect from 15th August, 1949. By para. 9 of the schedule it was provided that holiday remuneration should accrue to a worker during the period of twelve months beginning on 1st May, 1948, and thereafter in each successive period of twelve months beginning on 1st May, in accordance with a table annexed to the paragraph. The organisation, being opposed, not to holidays with pay, but only to their retrospective imposition, brought this action for a declaration that the Wholesale Mantle and Costume Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1949 (S.I. 1949 No. 1402), purporting to have been made by the Minister under s. 10 of the Wages Councils Act, 1945, was *ultra vires* and void, and that employers of workers in the trade as specified in the order were not bound by proposals set out in the schedule to it. By s. 10 (2) of the Act of 1945, "Wages regulation proposals for fixing holiday remuneration may contain provisions as to the times at which and the conditions subject to which that remuneration shall accrue and shall become payable, and for securing that any such remuneration which has accrued due to a worker during his employment by any employer shall, in the event of his ceasing to be employed by that employer before he becomes entitled to be allowed a holiday by him, nevertheless become

payable by the employer to the worker." By s. 10 (4): "Where the Minister receives [certain] wages regulation proposals he shall make an order . . . giving effect to the proposals as from such date as may be specified in the order." (*Cur. adv. vult.*)

SOMERVELL, L.J., said the basis of the action was the contention that para. 9 was retrospective, that an order containing a retrospective provision was *ultra vires* unless the Act under which it was made plainly authorised it, and that the Act of 1945 did not plainly authorise the retrospective elements in the order. It was plain that, by para. 9, the length of the holiday to be granted after the specified date, 15th August, 1949, depended or might depend on whether or not the person in question had been employed before that date; but the employers, he thought rightly, did not rely on that as retrospective. In *R.* v. *St. Mary, Whitechapel, Inhabitants* (1848), 12 Q.B. 120, at p. 127, Denman, C.J., said that a statute was not properly called retrospective because a part of the requisites for its action was drawn from time antecedent to its passing; and he had made similar observations in *R.* v. *Christchurch Inhabitants* (1848), 12 Q.B. 149, at p. 156. The argument for the organisation was based on the use of the word "accrue" in para. 9. It was argued that a provision for accrual before the specified date involved the conception of conferring rights before that date. There was force in that, and the Attorney-General admitted that the use of the word "accrue" was unfortunate. The quotations from Denman, C.J., showed that not every matter which was retrospective in a sense was retrospective in the sense in which the word must be applied here. He (his lordship) had come to the conclusion that the effect of para. 9 did not make the order retrospective in that sense. The claim therefore failed and would be dismissed. Had he held para. 9 retrospective, the Attorney-General would have argued that its retrospective character was expressly authorised by s. 10 (2) of the Act. The principle that no statute or order was to be construed as having retrospective operation unless that appeared very clearly or by necessary and distinct implication in the Act would have been a formidable obstacle in the way of any such argument.

APPEARANCES: *Sir David Maxwell Fyfe*, K.C., and *P. Quass* (*A. L. Dollond & Co.*); *Sir Hartley Shawcross*, K.C. (*Attorney-General*), and *Rodger Winn* (*Solicitor, Ministry of Labour and National Service*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

SOLICITORS: COSTS IN SETTLED ACTIONS

Barker and Another *v.* S. Green & Sons, Ltd.

Lord Goddard, C.J., Hilbery and Byrne, JJ. 18th July, 1950

Practice direction.

The settlement of an action by a widow and her infant children under the Fatal Accidents Acts, 1846–1908, was brought to the attention of the court.

LORD GODDARD, C.J., made the following statement: For many years now it has been provided by R.S.C. Ord. XXII, r. 14 (9) and (11), that in cases of this kind the costs are to be taxed, and that no agreement with regard to costs between the parties is recognised or permitted. There are very good reasons why those rules were deliberately made, and notice has been posted in the courts reminding solicitors of them. The notice states in conclusion: "It is important that it should be known that if they [the rules] are deliberately disobeyed, the solicitors responsible are liable to be dealt with for contempt of court." Cases in which settlements have been reached or where orders withdrawing the cases have been made are reported to taxing masters so that they may see that these rules are complied with. I emphasise once more that it is the duty of solicitors who appear for plaintiffs in these cases where there is a settlement to carry in their bill of costs to be taxed, and not to come to any agreement with the other side with regard to them. In this particular case there is no reason to suppose that anything has been done to the prejudice of the parties, but I ordered that the matter should be mentioned in open court, after my attention had been drawn to it by the masters, for the purpose of emphasising once more the importance of strict adherence to this rule. It was passed for very good reasons, which the profession understands and knows. The fact that there has been no prejudice to the clients in this case is fortunate and what one would expect having regard to the solicitors employed on either side. Once more, however, it should be remembered that this rule is absolute: it gives no discretion to solicitors to come to an agreement one way or another. The rule is absolute that in these cases the costs are to be taxed and certified by the taxing master, and that no costs other than those certified are payable by the solicitors for the plaintiff. The court will accept the apology of the solicitors on either side for the fact that they overlooked this matter. I hope that it will not occur again, for strict adherence to this rule is essential and will always be enforced by the court.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

NEGLIGENCE: CENTRAL-HEATING BOILER UNLIT DURING FROST

Frensham (George), Ltd. *v.* Shorn (M.) & Sons, Ltd., and Another

Finnemore, J. 18th July, 1950

Action.

The plaintiffs and the first defendants were tenants of different storeys of a building of which the second defendants were landlords. Both storeys were heated by hot-water radiators, part of a central-heating system of which the landlords had exclusive control. The defendants' lease contained mutual covenants with regard to central heating. The plaintiffs' lease made no reference to it. Windows in the defendant tenants' premises were still unglazed after having been damaged by bomb, but the openings had been closed as far as possible by means of cardboard and sacking. During a weekend in February, 1948, when the landlords had let the boiler fire out, a radiator in the defendant tenants' premises near one of the window openings burst, and the plaintiffs suffered damage from the resulting flooding, for which they brought this action.

FINNEMORE, J., said that in his view the case did not turn upon the relationship of landlord and tenant, but merely on allegations of negligence. It had been argued for the landlords that, as there was no covenant by them in the plaintiffs' lease for the supply of hot water, the plaintiffs could not successfully maintain a claim arising out of the failure of that supply; and further that the landlords were not responsible to the various tenants of the premises unless they (the landlords) occupied some part of the premises for the maintenance of which they were responsible. He thought that, in view of the landlords' retention of a measure of control over the building, including complete control of the heating system, the employment of a boilerman, and the prohibition to tenants against interfering with the heating system without permission, it was the landlords' duty to exercise reasonable care in the maintenance of that system, and to manage the boilerhouse and tanks without negligently causing damage. The landlords were under a plain duty to everyone on their premises—and probably to those on the next-door premises if they were affected—to act reasonably and properly and without negligence with regard to the heating system. Their duty was either not to let out the boiler fire or, if it had been let out and then the outside temperature dropped, to relight it or, at the least, to warn tenants who might be affected that the boiler fire would not be maintained over the weekend, so that the tenants could perhaps take other precautions.

They had failed to do any of those things, and had therefore acted negligently. He would assess the damages at £300. As to the first defendants, he was unable on the facts to find them guilty of any negligence. The mere fact that they knew that the premises were cold and that some windows were cracked or without glass was not negligence on their part. Judgment for the plaintiffs against the defendant landlords. Judgment for the defendant tenants.

APPEARANCES: *Charles Lawson* (*Thornton, Lynne & Lawson*); *W. A. Fearnley-Whittingstall*, K.C., and *A. H. Head* (*Hair and Co.*); *Stephen Chapman* (*Stanley & Co.*) (landlords).

[Reported by R C CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Adoption Societies Regulations, 1950. (S.I. 1950 No. 1368.)

Aliens (Approved Ports) Order, 1950. (S.I. 1950 No. 1374.)

Draft **Foundries** (Parting Materials) Special Regulations, 1950.

Fur Apparel (Amendment No. 2) Order, 1950. (S.I. 1950 No. 1368.)

Furniture (Maximum Prices) (Amendment) Order, 1950. (S.I. 1950 No. 1306.)

Import Duties (Drawback) (No. 6) Order, 1950. (S.I. 1950 No. 1371.)

Kitchen Waste (Licensing of Private Collectors) (Extension No. 2) Order, 1950. (S.I. 1950 No. 1361.)

Legal Aid and Advice Act, 1949 (Commencement) Order, 1950. (S.I. 1950 No. 1357.)

Legal Aid (Assessment of Resources) Regulations, 1950. (S.I. 1950 No. 1358.)

Legal Aid (General) Regulations, 1950. (S.I. 1950 No. 1359.)

The Commencement Order, the Assessment of Resources Regulations and the General Regulations are all dealt with in the article at p. 541, *ante*.

London-Carlisle-Glasgow-Inverness Trunk Road (Victoria Street and Other Streets, Luton) Order, 1950. (S.I. 1950 No. 1356.)

London Traffic (Prescribed Routes) (No. 14) Regulations, 1950. (S.I. 1950 No. 1373.)

Milk Distributive Wages Council (Scotland) (Constitution) Order, 1950. (S.I. 1950 No. 1360.)

Milk Marketing (Counties of Moray, Banff and Orkney) (Charges) (Revocation) Order, 1950. (S.I. 1950 No. 1362.)

Superannuation (Borstal Matrons) (Scotland) Order, 1950. (S.I. 1950 No. 1375.)

Utility Apparel (Maximum Prices and Charges) Order, 1949 (Amendment No. 9) Order, 1950. (S.I. 1950 No. 1305.)

Utility Apparel (Nurses' Uniforms) (Manufacture and Supply) Order, 1950. (S.I. 1950 No. 1364.)

Utility Apparel (Oilskins) Order, 1950. (S.I. 1950. No. 1365.)

Utility Apparel (Waterproofs) Order, 1950. (S.I. 1950 No. 1366.)

Utility Furniture (Marking and Supply) Order, 1950. (S.I. 1950 No. 1307.)

NOTES AND NEWS

Honours and Appointments

Mr. J. VINCENT DAVIES, M.B.E., solicitor, of Llanelly, has been appointed local secretary at Swansea, on The Law Society's Staff for the Legal Aid Scheme under the Legal Aid and Advice Act, 1949. He will also serve as local secretary at Bridgend, Neath, Port Talbot, Llanelly, Carmarthen, Haverfordwest and Aberystwyth.

Mr. G. H. RICHARDSON, assistant solicitor in the Oldham town clerk's department, has been appointed principal assistant solicitor in the secretary's department of the North Western Electricity Board, Manchester.

Personal Notes

The resignation of Mr. Ronald Sykes from his position as stipendiary magistrate for the City of Leeds, on the ground of ill health, has been accepted with much regret by Leeds Finance and Parliamentary Committee.

Miscellaneous

TOWN AND COUNTRY PLANNING ACT, 1947

DISPOSAL OF S. 82 AND S. 83 LAND

In para. 29 of "Practice Notes" (First Series) the Central Land Board drew attention to ss. 82 and 83 of the Town and Country Planning Act, 1947, which provide that when land held by local authorities for general statutory purposes, or for comprehensive development or redevelopment, ceases to be within the relevant section by reason of a disposal, no development charge is payable for development for which planning permission had been given *before* the disposal. As far as s. 82 is concerned, this provision applies only to land held by the local authorities on 1st July, 1948.

The Board wish to make it clear that when s. 82 and s. 83 land is disposed of for development they will not regard that development as liable to development charge, provided planning permission, at least in principle, is obtained for it by the time the conveyance or assignment is made, or the lease is executed, even though an earlier agreement (including a building agreement) to sell or lease has been entered into.

Wills and Bequests

Mr. W. Bateson, solicitor, of Leeds, left £52,002 (£49,731 net). He left £200 each "as token of regard for faithful service to me in my practice as a solicitor" to his managing clerk and his cashier.

Mr. J. T. Halsall, solicitor, of High Holborn, London, W.C.1, left £34,425 (£32,699 net).

PRINCIPAL ARTICLES APPEARING IN VOL. 94

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